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No. 74-1319

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MEMORANDUM IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondent, Liberty Mutual Insurance Company, opposes the issuance of a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Third Circuit [reported at 508 F.2d 239 (1975)], which vacated the District Court's order with respect to the improper inclusion in the class of employees whose claims were time barred. This decision is based on well-settled and uniformly applied precedent; accordingly, no issue worthy of review is presented.

1. The question presented by this petition—whether compliance with section 706(d) of Title VII of the Civil Rights Act of 1964 is a jurisdictional prerequisite to suits brought under that Act—has already been specifically resolved in the affirmative by this Court in the recent cases of *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36 (1974) and *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), as the Petitioners themselves have conceded (see pet. p. 8 n. 7). The decision below, which excluded those individuals failing to satisfy this jurisdictional prerequisite, is in accord with the decisions of this Court, as well as the decisions of numerous other courts which have passed upon this issue.[1] Therefore, contrary to Petitioners' reason for granting this writ (see pet. p. 7), this is a question of law which has been settled by this Court. Moreover, it is significant to note that the petition fails to cite any decisions of the Courts of Appeals, or even of District Courts, which are in conflict with the decision below. This notable absence of any conflict in decisions, and the fact that this decision is in accord with well-settled precedent, clearly demonstrates the inappropriateness of granting review herein.

2. The Petitioners' contention, that this jurisdictional prerequisite is abrogated when a Title VII suit is brought

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[1] With respect to excluding such individuals from a Title VII class action see e.g., *CWA* v. *New York Telephone Co.,* 8 FEP Cases 509 (S.D.N.Y. 1974); *Polston* v. *Metropolitan Life Insurance Co.,* 7 FEP Cases 406 (W.D. Ky. 1974); *Jones* v. *Holy Cross Hospital,* 64 F.R.D. 586 (D. Md. 1974); *Mather* v. *Western Air Lines,* 59 F.R.D. 535 (C.D. Cal. 1973); *Gilbert* v. *General Electric Company,* 59 F.R.D. 267 (E.D. Va. 1973); *Hecht* v. *C.A.R.E., Inc.,* 351 F.Supp. 305 (S.D.N.Y. 1972); *Diaz* v. *Pan American World Airways, Inc.,* 346 F.Supp. 1301 (S.D. Fla. 1972); and *Garneau* v. *Raytheon Co.,* 3 FEP Cases 1215 (D. Mass. 1971).

in the form of a class action, is without merit. As this Court has recently stated with respect to satisfying jurisdictional requirements in class action suits, "one plaintiff may not ride in on another's coattails." *Zahn* v. *International Paper Company,* 414 U.S. 291, 301 (1973). Since these former employees who have been excluded would have been unable to file this suit in their own name,[2] they are also unable to participate as members of the class. Indeed, contrary to Petitioners' claim that the decision below was too restrictive, if review is granted, it would be Respondent's position that this holding was too broad and that membership in the class must be determined as of the date of the filing of the class action complaint in federal court, and not as of the date that charges were filed with the E.E.O.C. See *American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538, 550, 554 (1974). Furthermore, Petitioners' alternative contention that they should be treated as private attorney generals and have the provisions of section 707 of Title VII apply to them, is a matter which was not previously raised, nor considered, in the Courts below. Aside from the clear impropriety of raising such an issue for the first time in a petition for certiorari, granting review of such an issue would result in having this Court unnecessarily enter the "thicket" of unresolved questions concerning the procedural requirements of governmental Title VII suits. Accordingly, it is clear that it would be inappropriate to grant review of this petition.

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[2] It is significant to note that the Equal Employment Opportunity Commission, which administers Title VII, participating as *amicus curiae* in the decision below, specifically indicated to the Third Circuit the appropriateness of excluding these former employees from the class, (See E.E.O.C. *amicus curiae* brief filed in Appeal No. 74-1515—Third Circuit, at p. 15).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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